

# Sex as an “accident”

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considers ACC cover for unintended pregnancies

In *Allenby v H* [2010] NZSC 33, the Supreme Court ruled that pregnancy qualified as a “personal injury” under the accident compensation legislation and that H could claim ACC cover for a pregnancy resulting from a failed sterilisation. The Supreme Court also stated that a pregnancy resulting from rape could receive cover as personal injury caused by an accident. A majority went on to say that consensual sex would not qualify as an “accident” for ACC purposes. This note considers that issue further.

## COVER FOR PREGNANCY

The history of cover for pregnancy under the ACC scheme is a muddled series of legislative changes and judicial decisions, rightly described by Blanchard J at [68] as “torturous”. One constant throughout the scheme is that a condition must qualify as a “personal injury” and be caused under certain circumstances to receive cover. H would have had cover for her pregnancy resulting from failed sterilisation had it happened prior to the commencement of the Accident Rehabilitation and Compensation Insurance Act 1992. The 1992 Act substantially restructured the scheme and introduced new definitions of “personal injury” and “accident”. This was in part a response to “a series of statutory, administrative and judicial decisions [that] resulted in an extension of the scheme’s boundaries beyond what was originally intended” (W F Birch *Accident Compensation: A Fairer Scheme* (Office of the Minister of Labour, Wellington, 1991) at 8.) The 1992 Act was silent as to cover for pregnancy, so the question arises: did the 1992 Act intend to continue cover for pregnancy, or exclude it? The relevant 1992 Act definitions were carried through to the current act, the Accident Compensation Act 2001 (“the 2001 Act”), so the answer to that question applies to the current ACC scheme and to H, who became pregnant in 2005 after the failed sterilisation procedure in 2004.

After the introduction of the 1992 Act there were several District Court decisions declining cover for unwanted pregnancies resulting from failed sterilisations on the basis that pregnancy was not a “personal injury” under the then new legislative scheme. The question was first addressed by the High Court in *Accident Compensation Corporation v D* [2007] NZAR 679 (HC), where Mallon J, after a detailed discussion of the physical effects of pregnancy on a woman (at [71]–[76]) found that pregnancy resulting from a failed sterilisation was covered. The decision was overturned in *ACC v D* ([2008] NZCA 576), by a majority of the Court of Appeal who thought that the 1992 Act was intended to remove cover for pregnancy.

## ALLENBY

H became pregnant after a failed sterilisation that had been performed by the appellant medical practitioner, against whom she brought civil proceedings. Allenby applied to

strike out the proceedings on the basis that they were caught by the bar on civil proceedings for personal injury (2001 Act, s 317.) Since the issue of pregnancy resulting from failed sterilisation had been addressed by the Court of Appeal in *ACC v D*, the High Court removed the application to the Court of Appeal, which granted a formal judgment adhering to *ACC v D* in order to allow the matter to reach the Supreme Court (*Allenby v H* [2011] NZCA 251.) In the Supreme Court, Allenby sought to use the ACC scheme as a shield against a civil remedy. The Accident Compensation Corporation argued against cover. H was neutral to the outcome of the case because either way she would have a remedy.

The Supreme Court bench all adopted Mallon J’s approach to the interpretation of “personal injury” ([18] per Elias CJ, [51] per Blanchard J and [88] per Tipping J) and all found that pregnancy fell within the definition of “personal injury.” After surveying the “torturous” history noted above, Blanchard J (who gave the reasons of himself, McGrath and William Young JJ) stated at [68] that:

[T]wo conclusions can immediately be drawn. The first is that, as has been seen in the description of the provisions of the 2001 Act, the expression “personal injury” is used in an expansive way. It has a statutory meaning. The second is that it is most unlikely that Parliament, having expressly extended the scheme in 1974 to give cover for pregnancy resulting from rape, would have sought to remove that cover in 1992 without very directly addressing the subject in the new legislative provisions.

Tipping J agreed with Blanchard J but gave a separate judgment to state his own reasons “[b]ecause of the significance of the issues involved” ([85]). Elias CJ gave a separate judgment to add some technical points to the discussion of pregnancy as a personal injury, and express reservations over what the other Judges had to say about the relevant of consent to cover for personal injury by accident.

## SEX AS AN ACCIDENT

Since pregnancy is a personal injury, and the ACC scheme provides cover for personal injury by accident, pregnancy resulting from sex is covered under the scheme if sex falls within the definition of “accident”. The definition of accident includes the application of a force external to the human body (s 25(1)(a)(i)), and the Supreme Court had no difficulty concluding that rape was an accident (per Elias CJ at [15], Blanchard J at [72] and Tipping J at [92].) Mallon J in *ACC v D* may have thought otherwise. When briefly addressing whether consensual sex was an accident she stated at [88] that “[i]t might be argued that it is outside the definition because if the force remains external no pregnancy will result”.

The definition of accident says nothing about intent or consent. On the face of it, this suggests that pregnancy

## [2012] NZLJ 188

resulting from rape and pregnancy resulting from consensual sex are both personal injury caused by accident for ACC purposes. The Supreme Court realised this, and, apart from Elias CJ, were keen to close the floodgates.

Blanchard and Tipping JJ both thought that Parliament clearly could not have intended unwanted pregnancy from consensual sex to be covered by ACC. Blanchard J at [82] stated “where a woman chooses to engage in intercourse, during which she suffers no physical harm but as a result of which she falls pregnant, it cannot sensibly be said that there has been an “accident” within the statutory definition” and that consensual sex as an accident was “plainly” outside the purposes of the accident compensation scheme.

Tipping J at [93] stated that “Parliament cannot have intended that the force involved in a consensual case would mean that an ensuing unwanted pregnancy which occurred by reason, for example, of failed contraception or carelessness as to contraception, had cover under the Act because it resulted from an accident” and at [94] said that consensual sex as an accident was “contrary to the policy and purposes of the accident compensation legislation”.

To which we might respond: Exactly what policy and which purposes are those that justify a special definition of “accident” that takes into account for sex and only for sex? The interpretation section of the 2001 Act (s 6) states that “accident” has its defined meaning unless the context otherwise requires, but it is still an extraordinary feat of statutory interpretation to introduce a special definition for sex.

### RISK-TAKING AND CONSENT TO INJURY

The ACC scheme is generally no-fault. Risk-taking or carelessness is no basis for disqualification. This is reflected in the definition of accident, which does not mention consent, and the definition of work-related personal injury which states that it is irrelevant to the decision whether a person suffered a work-related personal injury that, when the event occurred, the injured person was acting in contravention of instructions or indulging in misconduct, skylarking or negligence (s 28(7)).

There are some cases where consent is relevant for ACC purposes. The scheme provides cover for what are called “sensitive claims” — mental injuries resulting from acts that fall within the description of various sexual offences. The Court of Appeal in *KSB v ACC* [2012] NZCA confirmed that sensitive claim cover for sexual violation requires a lack of consent on the part of the victim. The Court of Appeal thought it was inconceivable that Parliament intended to provide cover for mental injury resulting from consensual sex. That said, the kind of “consent” the Court of Appeal had in mind in *KSB* was informed consent. Failure to disclose HIV status, for example, would vitiate that consent.

The 2001 Act provides machinery to address wilfully self-inflicted injuries and suicide. Rather than exclude such unhappy events from the definition of “accident”, entitlements are limited. Section 119 of the Act states that ACC must not pay any entitlements in such cases, other than treatment and services ancillary to treatment. An exception applies if the claimant has a mental injury covered by ACC. Courts have set a high threshold for when a claimant is regarded as having wilfully self-inflicted an injury. For example, in *Big Glory Seafoods v ARCIC* (DC Auckland 90/98, 5 May 1998), Judge Beattie found that a claimant who punched a freezer in a display of machismo intended the punch but did not wilfully intend the resulting wrist fracture.

Applying this reasoning, if consensual sex was an accident, then a resulting unwanted pregnancy is not a wilfully self-inflicted injury and disentitlement under s 119 would not apply. In the case of intended pregnancy, s 119 would apply, but ACC would still be liable for treatment. Imposing the cost of treatment for intended pregnancies on the ACC scheme cannot have been intended, which does provide one reason to adopt a special definition of accident for sex.

The definition of “treatment injury” (which replaced “medical misadventure” and is an alternative ground for cover to “accident”) at s 32(2)(c) excludes “personal injury that is a result of a person unreasonably withholding or delaying their consent to undergo treatment”. Injuries suffered as a result of treatment while the claimant is a participant in a clinical trial can qualify as a treatment injury if the claimant did not give their written agreement (s 32(4)–(5)).

The consistent theme here is that only in clear cases of intent (consent to sex, wilfully self-inflicted injury, agreeing to a clinical trial) does the legislation bar cover or limit entitlements. It is not clear what the justification is for applying a weaker approach to sex.

### DRAWING LINES

As Elias CJ observed at [7], the accident compensation legislation provides cover on the basis of line-drawing which reflects policy choices. These policy choices should be made by Parliament; they involve spending public money and choosing between competing policy objectives. We should be cautious of judicial pronouncements of what Parliament can or cannot have intended where no further reasoning is given. What Parliament can be conceived as having intended changes over time, as attitudes change. In *L v M* ([1979] 2 NZLR 519 (CA)), Cooke J thought that conception and childbirth, however unwanted, could not naturally be described as personal injuries. In *XY v ACC* ((1984) 2 NZFLR 376 (HC)), Jeffries J stated at 380 that:

The Court does not find that our supreme legislative body intended to stigmatise possibly the highest expression of love between human beings, that of a mother for her child, as a continuing injury by making compensation payable during dependency.

The Supreme Court in *Allenby* viewed pregnancy in quite a different light. Is it really so clear that consensual sex could not be regarded as an “accident”? In ordinary speech an “accidental pregnancy” has meaning. There is no clear principle behind the lines drawn by *Allenby*.

It is not clear why an unwanted pregnancy resulting from a failed sterilisation should be treated differently from one resulting from a burst condom (which Blanchard J uses as an example at [82]). In both cases, precautions have been taken but failed. There might even be an argument that the failure of a prescribed condom is a treatment injury — treatment includes the provision of prophylaxis and the failure of any equipment, device, or tool used as part of the treatment process (s 33(1)(f)–(g)). It is also not clear why carelessness as to contraception should be treated differently from carelessness to risk of any other kind of injury.

Importing consent into the definition of “accident” cuts against the no-fault nature of the scheme and carves out an exception for sex with no clear justification. Perhaps in the future, the majority’s view of what Parliament intended will be rejected, as they rejected earlier pronouncements that pregnancy could not have been intended to be a personal injury. □